1965

Cherie Burkhalter, and Guardian Ad Litem of Robin Burkhalter, A Minor v. John Gunther : Respondent's Brief

IN THE SUPREME COURT
OF THE
STATE OF UTAH

CHERI BURKHALTER and
CHERI BURKHALTER,
Guardian Ad Litem of
ROBIN BURKHALTER, a minor,
Plaintiffs and Appellants,

vs.

GRANDEUR HOMES and
JOHN GUNTHER,
Defendants and Respondents.

Case No. 10369

RESPONDENTS' BRIEF

Appeal From the Judgment of the District Court
Salt Lake County
Honorable A. H. Ellett, Judge

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

CHERIE BURKHALTER and LESLIE BURKHALTER, by Ad Litem of ROBIN BURKHALTER, a minor, *Plaintiffs and Appellants,* vs. VANDER HOMES and BEN GUNTHER, *Defendants and Respondents.*	Case No. 10369

RESPONDENTS' BRIEF

STATEMENT OF NATURE OF CASE

The appellant Cherie Burkhalter in her own behalf and as guardian ad litem for her minor child appeals from an adverse judgment of the District Court of Salt Lake County in an action for the alleged wrongful death of her husband.

DISPOSITION IN LOWER COURT

The appellants brought suit in the District Court of Salt Lake County against the defendants claiming a right to damages because of the alleged negligence of the defendant Ben Gunther causing the death of Leslie Terry Burk-

halter, husband and father to appellants [illegible]
to a jury and based upon special interrogatories [illegible]
of no cause of action was entered against [illegible]

RELIEF SOUGHT ON APPEAL

The respondents submit the judgment [illegible]
should be affirmed

STATEMENT OF FACTS

The respondents submit the following statement [illegible]

At approximately 8:45 a.m. on May 4 [illegible]
Gunther, a corporate officer of Grande [illegible] H[illegible]
operating a ¾-ton pick-up truck [illegible] [illegible]
Street in Salt Lake County. R. [illegible] He was [illegible]
business. The truck was painted white with [illegible]
and had a big red "V" painted on the side. R. [illegible]
cording to Mr. Gunther, there was lumber in the [illegible]
truck which protruded about 4 feet beyond the [illegible]
230. Other witnesses estimated 6 feet.

The day was cloudy and windy, but visibility was [illegible]
and the pavement was dry. As Mr. Gunther approached
Gordon Lane which runs east from State Street [illegible]
South, he pulled over into the far left hand turn [illegible]
signaled to make a left turn onto Gordon Lane. R. [illegible]
State Street in this vicinity is constructed so that it [illegible]
separates north and southbound traffic. Ex. D17. At the
intersection with Gordon Lane there are three lanes of
traffic on each side of State Street, and in addition a left
turn lane on both the north and south side of Gordon Lane
for collecting traffic so that left turns can be made [illegible]
either side of State Street. Ex. D17.

Gunther waited while one car passed, then [illegible]
path was clear and observing nothing which gave [illegible]

... signaled to make his left turn (R. 210). He ... was across the other lane of traffic when ... Terry Burkhalter, travelling north- ... lane on State Street on a motor- ... Mr. Gunther's truck (R. 211, 212, Ex. D17). ... impact practically demolished the motor- ... severe damage to the truck at the point of ... an imprint of the motorcycle head- ... (Ex. D13, 9, 12, 13 and 14). The point ... feet 4 inches from the north island and ... from the south island and 6 feet 8 inches ... edge of Gordon Lane (R. 87, 89). Although ... witnesses put the deceased's speed at forty ... other witnesses, some familiar with motor- ... was speed at over fifty and probably sixty ... (R. 241, 249). Mr. John Reich testified the ... pushing his motorcycle "real hard" (R. ... speed limit was posted at 40 m.p.h. As a result ... the deceased was thrown into the bed of the ... truck and killed.

... Eugene C. VanRoosendaal testified that he meas- ... feet 6 inches of straight skid mark laid down by the ... motorcycle (R. 92). The deceased's motorcycle ... small English Triumph and was a racing type of ... (R. 96).

Mr. Gunther said he first saw the motorcycle when it was ... feet away (R. 211) and that when the motorcycle ... struck was after his truck had gone about 2 or 3 feet ... wheels were just entering the gutter depres- ... (R. 214). The motorcycle struck the truck to the rear ...

... Sandquist who was waiting for a stop sign on ... Lane said he saw no decrease in the deceased's

speed before impact, and that the [illegible] cycle behind the deceased's [illegible] of the appellants' witnesses testified [illegible] swerved a little before impact, on cross-[illegible] admitted she could be wrong. R. [illegible] testified as to any deviation action by the [illegible] skid mark was in a straight line. R. [illegible]

Based on the above evidence, the jury found [illegible] deceased's failure to keep a proper lookout was a [illegible] ing proximate cause of the accident, and the Court entered a judgment for respondents. R. 265.

ARGUMENT

POINT I

THE EVIDENCE SUSTAINS THE JURY'S FINDING THE DECEASED FAILED TO KEEP A PROPER LOOKOUT AND THE COURT PROPERLY INSTRUCTED ON THE MATTER

The appellants contend that there is no evidence which the jury could have found that the deceased failed to keep a proper lookout in operating his motorcycle. On that contention, it is asserted that the jury's verdict should be reversed.

At the outset, it should be remembered that the evidence must be viewed in a light most favorable to the verdict in determining whether there is any evidence in the record to support the verdict, and also the Court's instructions. *Gordon v. Provo City*, 15 Utah 2d [illegible] P. 2d [illegible] (1964); *Smith v. Gallegos*, 16 Utah 2d [illegible] P. 2d [illegible] (1965). When the evidence is so viewed, the jury verdict was appropriate.

The facts in this case show that as Mr. Curtis approached the open area for a turn into George Lane

[illegible] signal which was properly [illegible] R [illegible] He stopped at the opening in [illegible] and his wheels were turned towards [illegible] He saw a car coming and stopped for it R [illegible] He waited an additional three or four [illegible] observing the road to be clear and present no [illegible] started his turn R 210, 222 . His turn was [illegible] before he was struck by the deceased. The [illegible] was 6 feet 8 inches from the east edge of [illegible] R [illegible] and when the front wheels of the truck [illegible] crossing the gutter depression in front of Gordon [illegible] motorcycle struck the rear of the truck R 211 .

[illegible] appellants argue the deceased kept a lookout [illegible] to change his direction, several factors belie [illegible] First, Vera Ruding who testified on direct [illegible] that she thought there was some diversion said [illegible] examination she could be mistaken and appeared [illegible] certain [illegible] Second, the skid mark from the [illegible] vehicle was in a straight line. Third, Mr. [illegible] Vern, who was a witness to the accident and testi- [illegible] appellants, did not observe any deviation from a [illegible] course. Also the motorcycle was not equipped with [illegible] shield, and there was no evidence that the deceased [illegible] goggles to alleviate the effect of onrushing air [illegible] [illegible] which would make it difficult [illegible] keep an adequate lookout ahead.

[illegible] witnesses who saw Mr. Gunther's turn testified it [illegible] turn R 248 , and further, he had traversed [illegible] and most of the third when he was struck, thus [illegible] a conclusion that he was visible to oncoming [illegible] some period of time. Additionally, he had paused [illegible] signal flashing prior to turning. When these facts

are viewed in toto, it is apparent that [illegible] been visible for some time to any observ[illegible] who if he saw him enter the intersect[illegible] would keep his vehicle under control [illegible] Since the respondent's turn was [illegible] traversed the greatest portion of the [illegible] have been a reasonably long period [illegible] been visible and a hazard to approach[illegible] if deceased's speed was [illegible] the time that he was approaching the [illegible] he would have travelled a great distance [illegible] opportunity to slow or change lanes. Deceased [illegible] peared to remain constant up to the time of [illegible] 249 , which when coupled with the short [illegible] marks for the high speed he was travelling [illegible] for the view that he was not observing the [illegible] and probably did not see the truck until respon[illegible] the far lane.

Witnesses and the respondent testified that the sound of the deceased's motorcycle first attracted [illegible] tention, thus supporting the view that deceased [illegible] proaching the turn-off area at a high rate of speed [illegible] indifferent or not observant of Mr. Gauthier's [illegible] slow turn" R. 248 . The presence of other motorcycles [illegible] the testimony of the high speed of deceased's vehicle [illegible] ports an inference that he may have been racing [illegible] observing only with gun-barrel vision.

It is worth noting that, at the time of trial [illegible] took no exception to Instruction No. 10 dealing with [illegible] lookout, thus supporting a conclusion that at that time

[illegible]

[illegible]

... of the evidence. Both parties were ... instruction. R. 33, 261.

... has on numerous occasions, ruled that the ... to maintain a proper lookout is one for ... *Bates v. Bates*, 3 Utah 2d 180, 281 P.2d 209 ... defendant had acted very much like respondent ... car was slowly traversing an intersection. He ... when he had just about completed ... through the intersection. The Court found that ... reason why the defendant could not have seen ... and the jury could properly find a failure ... proper lookout.

... *Carpenter*, 4 Utah 2d 378, 294 P.2d 788 ... Court observed:

... two motor vehicles collide without a claim ... by the drivers that failure to keep a ... lookout has at least contributed to cause the ... As a consequence this court has many ... considered the duty of a driver to keep such look- ... under varying circumstances and conditions. Mod- ... complexities make it impossible to lay down ... rule what will always be, or fail to be, rea- ... care in the operation of motor vehicles. The ... to keep a proper lookout is manifest but the ... to or violation of that duty must be deter- ... according to particular circumstance and in ... with the constantly varying exigencies ... each accident. As to what constitutes a ... lookout is usually, therefore, a latter-day classic ... for jury determination, and each trial and ... court must determine the question as a ... of law only when convinced that reasonable ... could not disagree upon the question when ... applying fact to law."

Spackman v. *Carson*, 117 Utah [illegible] (1950) involved a truck motorcycle collision. Court held the question of lookout was [illegible] also *Morrison* v. *Perry*, 104 Utah 151, 134 P. [illegible]

In *Martin* v. *Stevens*, 121 Utah 4[illegible] P. (1952), this Court considered the lookout [illegible] intersection case. The facts of that case [illegible] those in the instant case except plaintiff was [illegible] respondent here and deceased here like the [illegible] other case. This Court reversed the trial court [illegible] saying the question of contributory negligence [illegible] jury. The Court observed:

> "The question of contributory negligence is [illegible] the jury and the court should be reluctant [illegible] sideration of this question of fact from it. [illegible] *Mauchley*, 115 Utah 68, 202 P.2d 54[illegible] *Estate* v. *Union Pacific Railroad Co.*, [illegible] 239 P.2d 163. The expressions in those cases [illegible] accord with this uniformly accepted doctrine [illegible] right to trial by jury should be safeguarded. Before the issue of contributory negligence may be taken from the jury, the defendant's burden of proving [illegible] that plaintiff was guilty of contributory negligence proximately contributed to cause his own injuries must be met, and established with such certainty that reasonable minds could not find to the contrary. Conversely, if there is any reasonable basis, either because of lack of evidence, or from the evidence and the inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by the preponderance of the evidence either that plaintiff was guilty of such negligence proximately contributed to cause the injury, the plaintiff is entitled to have the case submitted to a jury."

... this case to the above rules, it seems ... court acted properly in submitting the ... and that their judgment must stand.

POINT II

... INSTRUCTIONS ON VEHICLES ... WAS ADEQUATE AND IN VIEW ... TO INTERROGATORIES, NOT ...

... appellants contend that the trial court committed ... Instruction No. 13. R. 35.

... submitted that the appellants could not ... by the instruction given. Instruction ... with the duty of the driver making the left ... the duty of one approaching a person mak- ... and turn to yield the right-of-way. In the ... jury found the respondent Gunther had ... a proper lookout. R. 265. Thus, the jury ... that Gunther was negligent in violating the re- ... an improper lookout as instructed upon in ... Thus, assuming that the trial court's in- ... was less favorable than appellants deserve in, as ... argument "precluded arguing to the jury the con- ... increasing duty on the part of Mr. Gunther," ... found Gunther negligent under the instructions ... to prejudice resulted.

... submitted that the instruction as given adequately ... the jury of the applicable standard if Instruction ... with Instruction 14 defining the term "immedi- ... The appellants' argument seems to be: 1) ... jury somehow was not aware that the left turn ... observe prior to making and during the turn,'

... failed to keep a proper lookout, appel-

and 2 that the jury was not aware of [illegible] the question of immediate hazard against [illegible] of the turn

As to the first contention, the Court [illegible] advises the jury that the time for making [illegible] as to when an immediate hazard exists is when [illegible] be "commenced." Further, when Instruction [illegible] with Instruction 14, it appears that the jury was [illegible] duty is created at the time the vehicle seeking to make [illegible] turn "approaches an intersection." Obviously, the [illegible] properly apprised of when the hazard must appear [illegible] the jury could have found there was no duty to [illegible] the hazard "before" turning simply is not explained [illegible] appellants' brief. Appellants' major objection seems [illegible] the failure to give the instruction in the exact language [illegible] J.I.F.U., 21.20. However, it appears that an analysis [illegible] J.I.F.U. 21.20 and Instructions 13 and 14 as given by the Court shows they are comparable, and that if viewed in the more expansive definition of "immediate hazard" as given by the Court, the jury was adequately apprised.

As to appellants' second contention that the jury failed to appreciate the need for the duty to extend throughout the full time of the turn, it is equally obvious the instructions were adequate. The jury was given the verbatim language of 41-6-73, U.C.A., 1953. Thus, they were told that the question of immediate hazard is to be judged "during the time when such driver is moving within the intersection." In *Smith* v. *Gallegos*, 16 Utah 2d 344, 400 P.2d [illegible] this Court observed:

> "... 'during the time when such driver is moving within the intersection.' The addition of the language [illegible] quoted clearly places a greater duty on the [illegible] in that he must yield not only to approaching [illegible]

... constitute a hazard prior to beginning ... case to vehicles which will constitute a ... vehicle is moving within the inter- ... includes the time it will be necessary ... to his turn."

... emphasized the statutory language as ... creating. Since the jury was given the ... statute's clear content, they were most ade- ... the applicable standard and apparently ... the standard. Further, it should be ... exception was taken by appellants to Instruc- ... "immediate hazard" which is the ... of the statute.

... instructions given are taken as a whole, it is ... were adequate, *Brooks v. Utah Hotel Co.*, ... 150 P.2d 127 (1946). There was no de- ... rules applicable in left turn cases, *Hayden* ... Utah 2d 171, 263 P.2d 796 (1953), and no ... appellants holds an instruction like that given ... to be erroneous let alone prejudicial where the ... found negligence against the turning party.

POINT III

THE COURT DID NOT COMMIT ERROR IN SUBMITTING THE CASE TO THE JURY ON SPECIAL INTERROGATORIES.

... Court submitted the issues in the case to the jury ... interrogatories. The Court advised the jury prior ... of the case that he intended to submit the ... on special interrogatories where they would ... questions as to liability and damages (R. 103-104). ... objection of any kind was taken to the Court's remarks, ... Court did was preview its intentions. If appel-

lants felt the remarks improper [illegible]
or excepted. *Hall v. Closz et al.* [illegible]
1962

> "If something occurs which party [illegible]
> prejudicial to him that [illegible]
> fair trial, he must object promptly [illegible]
> trial or ask for cautionary instruction [illegible]
> not, he waives whatever rights may [illegible]
> do so."

It is obvious that the comments of the [illegible]
harmful or confusing, nor did they learn any [illegible]
either party.

Appellants also argue the Instruction [illegible]
been given. No exception was taken to Instruction [illegible]
The failure of the appellants to except to the instruction
they deemed it improper precludes the consideration
on appeal. *Employers Mutual Liability Ins. Co. v. Oil Co.*, 123 Utah 253, 258 P.2d 445 (1953). Rule 51
U.R.C.P.

It is obvious that there is no merit to the appellants' contention on this point. The Court has clear discretion to submit a case to the jury on special interrogatories. Rule 49 U.R.C.P. If appellants had felt the questions were unfair they should have expressed their concern. *Bateman v. Bateman*, 6 Utah 2d 161, 308 P.2d 264 (1956). Obviously they did not do so because the questions were direct and easily understandable. The special verdict Rule 49(a) merely asked the jury to determine what acts of either party involved were the proximate cause of the accident, and to appraise Mrs. Burkhalter's damages without reference to liability. This was in accordance with Instruction 20 and is a proper procedure to avoid unnecessary trials if there is some [illegible]

[illegible] issue from that determined
[illegible] appear the jury was confused as to
[illegible] respect to the special verdict found
[illegible] contributory negligence," thus find-
[illegible] merely failed to specify the
[illegible] contributory negligence took. There
[illegible] jury was confused. Indeed, Instruc-
[illegible] to direct a jury to consider damages and
[illegible] contributory negligence. We submit that
[illegible] error on this point.

POINT IV

[illegible] INTERFERE WITH THE JURY'S

[illegible] note that the trial judge made the same
[illegible] error as in *Ellertson's*, 16 Utah 2d 145,
[illegible] 63. In that case, the Court reversed be-
[illegible] the jury brought into their box and
[illegible] assist in their deliberations. Thus, the
[illegible] examined the verdict and found it was incom-
[illegible] trial judge then resubmitted the matter to the
[illegible] and *... the jurors raise their hands in open*
[illegible] their vote on an unanswered interrogatory.
[illegible] were also polled as to the other questions they
[illegible] and when the Court found, upon a showing
[illegible] that there was no disagreement returned them to
[illegible] This Court reversed, finding that by requir-
[illegible] to disclose their verdict and voting in open
[illegible] right to privacy was invaded. No such thing
[illegible] instant case.

[illegible] was well aware of the *Cornia* case since
[illegible] involved. In this case, when the jury
[illegible] asked if a verdict had been reached and

was informed that it had. Thus, in this case the ... turned to the courtroom because they had reached ... R. 263. In *Cornia*, they had not. In this case ... interrogatories were answered; in *Cornia*, they were ... The foreman of the jury in this case informed ... that all eight jurors had agreed. R. 263. Upon ... tion of the verdict, it appeared that the ... quested under 1. b., although clear as to the ... and finding, had not been detailed. The Court ... the verdict to the foreman and advised him that ... as found could be inserted, but only if they had been ... on. The foreman wrote in the language appearing ... on before, and verdict was passed to each juror and ... the Court where it was read. No juror was asked ... hand or otherwise announce his vote in public. The ... had been reached before, and only the form of the ... was at issue. Consequently, this case in no way has the ... acteristics of the *Cornia* case.

Further, the appellants never voiced any objection ... took exception to the Court's action. Certainly if the ... pellants felt there was some prejudice or injurious ... propriety, they should have objected. Clearly, there ... none. No juror indicated his vote or was coerced into ... nor does it appear the deliberate process had not been ...

It does not appear that the appellants were prejudiced ... any manner. In *Domann v. Pence*, 183 Kan. 135, ... 321 (1958), the Court stated the jury's misconduct or ... propriety would not warrant reversal in the absence ... specific prejudice. If any error was involved in the ... case, it was clearly harmless, and, since substantial ... was done, reversal is not warranted. Rule 61, U.R.C.P.

CONCLUSION

[illegible] presented a jury question. The jury re-[illegible] adverse to appellants. An examination of [illegible] reveals that the evidence supports the verdict. [illegible] had their day in court, and were given a fair [illegible] Court should affirm.

Respectfully submitted,

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